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**RESPONSE OF  
HELLER FOR CONGRESS  
TO THE**

**FEDERAL ELECTION COMMISSION  
FACTUAL AND LEGAL ANALYSIS**



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TWIN CITIES

WASHINGTON, DC

Heller for Congress and Elisabeth Ballinger, in her official capacity as Treasurer ("the Committee") hereby respond to the Federal Election Commission's ("Commission") Legal and Factual Analysis ("Analysis"). The Committee respectfully urges the Commission to reject the allegation that the Committee knowingly accepted excessive and prohibited contributions from November Inc., Autumn Productions, NI Operations, and Foundations Inc. (n/k/a In Compliance Inc.). The Committee has no reason to believe that November Inc.<sup>1</sup> or Foundations Inc. extended credit to the Committee<sup>2</sup> outside the ordinary course of their respective businesses, or that the terms provided by November Inc. or Foundations Inc. were somehow more favorable to the Committee than to their other clients. The Committee has acted in good faith to pay the debts owed to all commercial vendors

<sup>1</sup> Autumn Productions and NI Operations are d/b/a's of November Inc. For the purposes of this Response, use of the term "November Inc." includes Autumn Productions and NI Productions, unless otherwise specified.

<sup>2</sup> Contrary to previous counsel's assertion, the Committee concedes that November Inc. and Foundations Inc. extended credit to the Committee under 11 C.F.R. § 116.1(e) since full payment was not required until after the services were rendered.

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and political consultants, not just November Inc. and Foundations Inc., and continues to make significant payments toward debt retirement as fundraising and cash flow permit. In fact, fundraising and cash flow permitted the Committee to retire the debt owed to Foundations Inc. in its entirety on March 11, 2009.

**I. PROCEDURAL BACKGROUND**

The Original Complaint filed by Howard Walter Herz ("Complaint") was received by the Commission on October 21, 2008. The Committee, through previous counsel, subsequently filed an initial response. The Analysis was received by the Committee on May 22, 2008.

**II. FACTUAL BACKGROUND**

As reflected in the Analysis, the Complaint contains two primary factual allegations that form the underlying premises of the Commission's investigation. First, the Complaint states that "the Committee has regularly and promptly paid for [other] services rendered during both the 2006 and 2008 campaign cycles." ANALYSIS at 1: 16-18 (citing COMPLAINT at 2) (internal quotations omitted). Second, the Complaint states that "it is not the usual or normal practice for political consulting companies to allow debts to go unpaid for two years. *Id.* (internal quotations omitted). These primary factual allegations, however, are fundamentally incorrect.

While the Committee has certainly attempted to make its payments regularly and promptly, the Committee's deficiency to pay all outstanding invoices as they become due is not unique to November Inc. and Foundations Inc. The Committee, unfortunately, has listed as many as twelve commercial vendors and political

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consultants on Schedule D of the its FEC Reports, which lists "Debts Owed by the Committee."<sup>3</sup> To the extent the Complaint is addressing payments for *new* services provided to the Committee by November Inc. and Foundations Inc. during the 2007 – 2008 election cycle, the Committee readily concedes that it was able to make these payments in a timely manner. Like most practical candidate committees, however, the Committee simply preferred paying its outstanding debt with funds specifically designated for debt retirement pursuant to 11 C.F.R. § 110.1.

The notion that political consultants regularly charge interest and institute legal action against clients for debts is incontrovertibly false. Of the twelve commercial vendors and political consultants mentioned above, some of who are still owed money, none have charged interest or instituted legal action despite remaining adamant about being paid. While there certainly are exceptions, the Committee believes that the Commission will be hard-pressed to deem this scenario "well outside the usual and normal practice of the political consulting industry."

### **III. LEGAL ARGUMENT**

The issue presented in this case is whether November Inc. and/or Foundations Inc. made a prohibited contribution in the form of an extension of credit to the Committee. As emphasized in the Analysis, the issue turns on whether the Committee's debt is a credit "extended in the ordinary course of the person's business, and the terms are substantially similar to extensions of credit to nonpolitical

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<sup>3</sup> The Committee has properly reported all debts owed to November, Inc., Foundations Inc., and other commercial vendors and political consultants in accordance with Commission regulations. In fact, it was the proper reporting of its debts that gave rise to the Complaint.

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debtors of similar risk and size of the obligation." ANALYSIS at 2:16-18 (citing 11 C.F.R. §§ 100.55, 116.3(b)). In assessing whether November Inc. and Foundations Inc. extended credit in the ordinary course of their respective businesses, the Commission will consider: (1) whether they followed their established procedures and past practices in approving the extension of credit; (2) whether they received prompt payment in full if they previously extended credit to the Committee; and (3) whether the extension of credit conformed to the usual and normal practice in their respective trades. See 11 C.F.R. § 116.3(c). The Commission will also consider whether November Inc. and Foundations Inc. each made a commercially reasonable attempt to collect the debt. 11 C.F.R. § 100.55. As demonstrated below, the Committee believes the extensions of credit from both November Inc. and Foundations Inc. fall squarely within the exceptions contemplated in 11 C.F.R. §§ 100.55 and 116.3(b), and thus no prohibited contribution has knowingly been accepted by the Committee.

**A. NOVEMBER INC.**

The Committee has no reason to believe that November Inc., which primarily provided general political consulting and fundraising services to the Committee, extended credit to the Committee outside the ordinary course of its business, or that the terms provided by November Inc. are somehow more favorable to the Committee than to their other clients. In the experience of the Committee's Treasurer, it is standard practice for political consultants and fundraising consultants to bill their clients for services after they are rendered, once actual costs are known. Similarly,

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November Inc. invoiced the Committee after the services were provided and requested payment within 30 days from the invoice date. These terms appeared, and continue to appear, to be similar to the terms offered by the majority of general political consultants and fundraising consultants in all material respects. While the services provided by November Inc. did cost substantially more money than the Committee's other commercial vendors, the costs are commiserate to the type of services provided by them (i.e., general political consulting and fundraising consultants are traditionally the most expensive commercial vendors hired in any political campaign). Logically, this also explains why November Inc.'s expenses have been the most challenging to pay.

The Complaint states that it is not the "usual or normal practice for consulting companies to allow debts to go unpaid for two years," which implies that November Inc. did not attempt to collect the debt and/or did not act within its usual course of business to collect the debt. *Id.* at 1:4-15. Although the Committee cannot recreate telephone conversations and has not recovered any emails prior to the Complaint being filed, November Inc. has clearly and consistently communicated their desire to collect the debt.

Finally, the Committee has acted in good faith to pay the debts owed to November Inc., and has made significant payments to retire the debt as fundraising and cash flow permit. The Committee has been able to repay a considerable amount of debt from the 2005 – 2006 election cycle following the 2008 general election, including \$19,700.00 to November Inc.

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**B. FOUNDATIONS INC.**

The Committee has no reason to believe that Foundations Inc., which provided treasury and compliance services to the Committee, extended credit to the Committee outside the ordinary course of its business, or that the terms provided by Foundations Inc. are somehow more favorable to the Committee than to their other clients. It is standard practice for treasury and compliance consultants to bill their clients for services after they are rendered, once actual costs are known; in fact, this is precisely the practice utilized by the Committee's current treasury and compliance consultant. Furthermore, the terms provided by Foundations Inc. appeared, and continue to appear, to be similar to the terms offered by the majority of treasury and compliance consultants in all material respects.

The Complaint states that it is not the "usual or normal practice for consulting companies to allow debts to go unpaid for two years," which implies that Foundations Inc. did not attempt to collect the debt and/or did not act within its usual course of business to collect the debt. *Id.* at 1:4-15. Although the Committee cannot recreate telephone conversations and has not recovered any emails prior to the Complaint being filed, Foundations Inc. clearly and consistently communicated their desire to collect the debt while it remained outstanding.

Finally, the Committee would like to point out that it acted in good faith to pay the debts owed to Foundations Inc., and made payments toward their debt retirement as fundraising and cash flow permitted. In fact, following the 2008

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general election, fundraising and cash flow permitted the Committee to retire the debt owed to Foundations Inc. in its entirety on March 11, 2009.

#### **IV. CONCLUSION**

As demonstrated above, the Committee maintains that it had, and still has, no reason to believe that November Inc. or Foundations Inc. extended credit to the Committee outside the ordinary course of their respective businesses, or that the terms provided by November Inc. or Foundations Inc. were somehow more favorable to the Committee than to their other clients. Thus, the Committee respectfully urges the Commission to dismiss this matter in its entirety.

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